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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 6073

CHARLES W. BRITT, JR.,

Petitioner

v.

STATE OF NORTH CAROLINA

Respondent

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA

OPINION BELOW

Petitioner was tried during the December 18, 1969, Session of Craven County Superior Court in Craven County, North Carolina, on an indictment charging first degree murder of one Janie Banks on the 24th of March, 1969. He was found guilty of second-degree murder and sentenced to thirty years' imprisonment from which appeal was filed to the North Carolina Court of Appeals. In the decision of the Court of Appeals, *State v. Britt*, 8 N. C. App. 262, 174 S. E. 2d 69 (Filed May 27, 1970), the North Carolina Court of Appeals found no error and affirmed the conviction. Petitioner filed a petition for certiorari in the North Carolina Supreme Court which was denied.

Petitioner's petition for writ of certiorari in this Court to the North Carolina Court of Appeals was allowed (401 U.S.____; 91 S. Ct. 1204, 28 L. Ed 2d 322).

QUESTIONS PRESENTED

I. WAS THE DEFENDANT DENIED DUE PROCESS OF LAW IN THE REFUSAL OF THE COURT TO ALLOW DEFENDANT A TRANSCRIPT OF THE FIRST TRIAL WHICH ENDED IN MISTRIAL?

II. WAS DEFENDANT DENIED DUE PROCESS OF LAW FOR THE REFUSAL OF THE COURT TO INSTRUCT THE PROSECUTOR NOT TO MENTION A KNIFE FOUND AT THE SCENE OF THE CRIME AND IN GRANTING A MOTION TO ADMIT CERTAIN FINGERPRINT EVIDENCE?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA

§ 14-17. *Murder in the first and second degree defined; punishment.* - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

STATEMENT OF THE CASE

The defendant was tried upon a bill of indictment charging him with murder in the first degree of Janie Banks.

The evidence of the State tended to show that the defendant went to the home of Janie Banks on 24 March 1969 and stabbed

her in the back with a knife. Then "(h)e threw the knife down on the floor and put his arm around her mouth so she couldn't holler, and grabbed an iron poker beside the heater. He beat her in the back and across the shoulder and beat her down to the floor. Then he went out of the front room toward the kitchen and came back in with this frying pan here. Just as he got back in the front room, she had started to get up; she was trying to make it up off the floor. He started beating her with the frying pan. He beat her until he beat her brains out." Thereafter, the defendant ransacked the house before leaving. The defendant offered no evidence.

The defendant, an indigent, was represented at the November 1969 trial, at the December 1969 trial, and on this appeal by the same two attorneys who were appointed on 3 June 1969 to represent him.

The first trial ended in a mistrial on 14 November 1969 when the jury could not agree on a verdict.

The second trial ended on 18 December 1969 after the jury had found the defendant guilty of murder in the second degree and the court had sentenced him to the State Prison for a term of thirty years.

ARGUMENT

I

THE DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW IN THE REFUSAL OF THE COURT TO ALLOW DEFENDANT A TRANSCRIPT OF THE FIRST TRIAL WHICH ENDED IN MISTRIAL.

This Court held in *Griffin v. Illinois*, 351 U. S. 12, at p. 19, 100 L. Ed. 2d 891, 76 S. Ct. 585 (1955), that "/d/estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

The various jurisdictional circumstances in which this Court has been presented with a transcript question are:

(1) *Griffin v. Illinois, supra*, wherein transcript of trial was requested for direct appeal. Illinois law allowed the county to furnish a transcript at public expense if the sentence was death. Alternatively, the Illinois Post-Conviction statute would provide a free transcript if constitutional questions were raised in petition for review.

(2) *Eskridge v. Washington*, 357 U. S. 214, 2 L. Ed. 2d 1269, 78 S. Ct. 1061 (1958), wherein transcript of trial was requested for direct appeal. Washington law allowed the State to furnish a transcript at public expense if in the judgment of the trial judge justice would be promoted.

(3) *Draper v. Washington*, 372 U. S. 487, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963), wherein transcript of trial was requested for direct appeal. The Rules of the Supreme Court of Washington, promulgated since *Eskridge*, again provided for review of the question of necessity by the trial judge. After a hearing on the question of necessity of the transcript, the trial judge found the assignments of error "patently frivolous" and denied the motion for the transcript.

(4) *Long v. District Court of Iowa*, 385 U. S. 192, 17 L. Ed. 2d 290, 87 S. Ct. 362 (1966), wherein transcript of an Iowa trial court hearing on a petition for habeas corpus was requested. The Iowa judge held that habeas corpus was civil in nature and no provision was made for furnishing a transcript.

(5) *Roberts v. La Vallee*, 389 U. S. 40, 19 L. Ed. 2d 41, 88 S. Ct. 194 (1967), wherein transcript of a preliminary hearing was requested in preparation for trial. New York law provided that a transcript of the preliminary hearing could be secured if paid for.

(6) *Gardner v. California*, 393 U. S. 367, 21 L. Ed. 2d 601, 89 S. Ct. 580 (1969), wherein transcript of a California trial court hearing on a petition for habeas corpus was requested. California appellate procedure provides for a hearing *de novo* on appeal.

(7) *Wade v. Wilson*, 396 U. S. 282, 24 L. Ed. 2d 470, 90 S. Ct. 501 (1970), wherein transcript of

trial was requested for preparation of a petition for habeas corpus.

In all of these cases, the Court has held that the criminal defendant was entitled to a copy of a transcript where it appeared that a cellmate, having the price of a transcript, could secure one. The only case not involving a direct or collateral attack on the trial itself or of some review of the trial (*Long and Gardner*), was *Roberts* and there a State statute provided for furnishing transcripts upon payment of the fee. Also, very much to the point of this Court's decision in *Roberts*, the New York Court of Appeal had only recently declared that very statute unconstitutional as applied to the indigent defendant.

Three Circuit Courts of Appeals have confronted and decided *the question presented by this appeal regarding the transcript of* a first trial resulting in mistrial.

In 1963 in an opinion by then Circuit Judge Burger, *Nickens v. United States*, 323 F. 2d 808 (D. C. Circuit, 1963), the court was confronted with a conviction in federal court challenged partly on the ground of failure to supply a transcript of a first trial which resulted in mistrial. The court said:

> There is no absolute right to have the transcript of a prior trial against the contingency, now urged, that some witness at the second trial may give inconsistent testimony. Any inconsistency in testimony arising at the second trial could readily be dealt with by calling the reporter of the prior trial to read the earlier testimony. Appellant had the same counsel at both trials. The District Court did not abuse its discretion in denying appellant's bare demand for a transcript in these circumstances. (323 F. 2d, at 811.)

In *Forsberg v. United States*, 351 F. 2d 242 (9th Cir., 1965), the decision of the court was much the same:

> Appellant was represented by the same counsel at both trials. The court ruled that it would permit the reporter, during the second trial, to read to appellant's lawyer, out of the presence of the jury, the testimony

> of any witness who had testified at the first trial. The district court did not abuse its discretion in denying appellant's request for a transcript under these circumstances. (351 F. 2d, at 248)

United States v. McMann, 408 F. 2d 896 (2d Cir., 1969), is the only case in the Circuit Courts of Appeals found to the contrary. *McMann* contained three strong elements not in the instant case which militated for a decision in favor of a right to a transcript: (1) the key to the prosecution's case was an undercover detective, the cross-examination of whom was very important; (2) the prosecutor in his summation alluded to the fact that inconsistent testimony had been suggested but not proven; and (3) the judge in charging the jury stated that the previous trial was only important if it showed inconsistent statements and he didn't remember such a showing.

In the present case, possible inconsistent testimony in the two trials deals only obliquely with the central issues of the case. For example, Detective Bratcher indicates that he does not recall his first trial testimony to be that he had the defendant and his girlfriend at the police station about an hour and a half (A. pp. 27, 28-29), although he does not deny that was true; he doesn't recall if he earlier testified as to defendant's clothes (A. p. 28). Bratcher indicated that he recalled his testimony from the first trial regarding where fingerprints were taken and what was dusted for prints (A. p. 35), except that if he said at the previous trial that he dusted the water glass, that was error (A. p. 38). None of these questions are essential to the State's proof of its case or to the defense. The police officer and Ethel Best are positive in their statements as to the elements of the offense and defendant's actions and impeachment as to the minor issues would have accomplished nothing.

For this Court to establish the "right" of the accused to a transcript of mistrials, absent a showing of need required by the federal statute (28 U. S. C. §§ 753(f), 1915), when defendant is represented by the same counsel at both trials would, we contend, unnecessarily burden the court system. The Sixth Circuit Court of Appeals in *Bentley v. United States*, 431 F. 2d 250 (1970), observed that such a decision would require substantial

appropriations and further burden already over-burdened reportorial and stenographic services of that Circuit. Although the number of such cases in North Carolina is unknown, one can well imagine that the bill for transcripts already paid by the State (approximately $75,000 annually) would increase.

Further, in this time when the disruptive defendant often causes a mistrial by his own misconduct, he might be given further impetus, being assured of a transcript with which to discredit a key witness or cloud the issues, to bring about a second, third or additional trials.

Rather, a mistrial should remain in law a nullity. Having no effect on the status of the defendant, unappealable, it should be treated as if it never happened, giving both the State and a defendant a fresh start with a new trial.

II

THE DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW FOR THE REFUSAL OF THE COURT TO INSTRUCT THE PROSECUTOR NOT TO MENTION A KNIFE FOUND AT THE SCENE OF THE CRIME AND IN GRANTING A MOTION TO ADMIT CERTAIN FINGERPRINT EVIDENCE.

The basic difference between the approach of the State and the defendant to this evidence regarding fingerprints is that the State will not concede the alleged irrelevancy of these fingerprints. Rather, they are considered to be highly material to the case. Defendant's motion in limine (A. p. 13) requests that the Court instruct the State and its counsel not to mention the fingerprints found on a butcher knife in the home of the deceased and considered to be the weapon which inflicted a stab wound in her back but which was not the wound resulting in death. Also, the evidence as to fingerprint identification from the police officers and the expert witness from the SBI dealt with the fingerprint of the defendant found on the butcher knife (A. pp. 23-25, pp. 39-41). Defendant at first denied to Detective Bratcher that he had seen the knife (A. p. 31) but later when he was told that his fingerprints were found on it, he told the detective that the knife was sitting at the end of the sofa by the heater when he was at the deceased's home

earlier that day and that he picked it up to throw it in the heater but then put it back down (A. pp. 31 & 32). The knife was found in a bent condition after the killing and was assumed to be the weapon which inflicted the stab wound in the back of the deceased. Although the medical witness indicated that he could not tell whether that wound was inflicted after the head injuries which caused death, he did say that the wound was inflicted at about the same time (A. pp. 46 & 47). Therefore, the knife becomes a weapon used by the killer, something more important than a mere fixture or a piece of glass around the point of entry of a building but the actual instrument by which the crime was partially accomplished. Its legal relevancy at that point is clearly established and the fact that defendant might have another explanation of why his fingerprints appeared on one of the defendant's weapons is something for the jury to consider and evaluate.

The case of *State v. Minton*, 228 N. C. 518, 46 S. E. 2d 296 (1948), relied on by the defendant, can easily be distinguished from the instant case. In *Minton* the defendant's fingerprint was found on a piece of glass which was evidently broken in order to secure entrance to a store. However, the piece of glass was in the door to the store and there was evidence that the defendant and several other persons had been customers of the store that day so there was a perfectly logical explanation for the print being there. The only evidence in the case was purely circumstantial. The Court emphasized, 228 N. C. at p. 521, that the thumb print of the defendant was found in a "public place" and that there were many other fingerprints on that same segment of glass which could not be identified and that the State had no way of knowing when the defendant's thumb print was put on the glass. In the instant case, we have not a "public place" but the home of the deceased. The print is not on a mere fixture or the outside of the house but on one of the weapons used by the assailant. In addition, the case has the confession of the defendant on testimony of the police officer and also the testimony of the defendant's girl friend who was present at the time of the killing. Therefore, unlike *Minton*, the evidence is not purely circumstantial against the defendant and the question of the presence of his fingerprints was a question properly for consideration of the jury.

CONCLUSION

The defendant was accorded a fair trial. Absent some showing of need, he is not entitled as a matter of right to secure the transcript of the first trial resulting in a mistrial. The fingerprint evidence, relevant to his touching the knife which was a weapon used by the assailant and his involvement in the crime itself were relevant and properly considered by the jury.

Respectfully submitted,

ROBERT MORGAN
Attorney General

(Mrs.) Christine Y. Denson
Assistant Attorney General

N. C. Department of Justice
Post Office Box 629
Raleigh, N. C. 27602

Telephone 919-829-4618

Member of the Bar of the
Supreme Court of the United
States